No. 22515

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HAROLD TYSK, INDIVIDUALLY AND AS MONTANA STATE DIRECTOR OF THE BUREAU OF LAND MANAGEMENT, AND STEWART L. UDALL, INDIVIDUALLY AND AS SECRETARY OF THE INTERIOR,

Appellants

v.

HENAULT MINING COMPANY,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF FOR APPELLEE

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Statutes Involved

Section 1 of the Act of May 10, 1872, 17 Stat. 91, R.S. sec. 2319, 30 U.S.C. Sec. 22, provides:

> "Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts so far as the same are applicable and not inconsistent with the laws of the United States."

Section 2 of the Act of May 10, 1872, 17 Stat. 91, R.S. sec. 2320, 30 U.S.C. Sec. 23, provides:

> "Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, located prior to May 10, 1872, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the 10th day of May 1872, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the 10th day of May 1872 render such limitation necessary. The end lines of each claim shall be parallel to each other."

Section 4 of The Surface Resources Uses Act of 1955, 69 Stat. 368-369, 30 U.S.C. Sec. 612, provides in part:

> "(a) Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto.
>
> "(b) Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States)."

Section 5 of the Surface Resources Uses Act of 1955, 69 Stat. 369, 30 U.S.C. Sec. 613 (a) entitled "Procedure for determining title uncertainties - Notice to mining claimants: publication, service" provides a method whereby the head of a Federal department or agency may institute a summary proceeding, in the nature of a quiet title action, "to determine the validity" and effectiveness of any unpatented mining claim located before the effective date of the Act.

STATEMENT OF THE CASE

This appeal is from a judgment of the Federal District Court for the District of Montana (R. 152-153) in an action brought by the Henault Mining Company, a South Dakota Corporation, appellee, against the Montana State Director of the Bureau of Land Management and the Secretary of Interior, appellants, wherein Henault sought by declaratory judgment.[1]

[1] Federal Declaratory Judgment Act, 28 U.S.C. 2201 et seq.

a judicial review[2] of a final decision of the Secretary of Interior (R. 33-52) and determination of the validity of 18 lode mining claims, owned by the plaintiff Henault, situated in the Black Hills of South Dakota, and under the administrative supervision of the Montana State Director of the Bureau of Land Management (R. 2-63).

In 1960 defendant Montana State Director of the Bureau of Land Management instituted a proceeding, under authority of Section 5 of the Act of The Surface Uses Act,[3] against a group of 21 contiguous lode mining claims located and held by the mining claimant (appellee) prior to 1955. The stated purpose of the proceeding was to establish the right of the Montana State Director to manage and dispose of the vegetative surface resources as provided for by the Act.

Because the claims were located prior to the effective date of the Surface Resources Uses Act, the Bureau sought, by their proceeding, to invalidate those prior locations and thereby subject the ground to the terms of the 1955 Act. The Bureau contested the locations upon the charge that they were invalid for lack of the discovery required by 30 U.S.C. sec. 23. (R 11)

Hearing was had upon the Bureau's sole allegation of lack of valid discovery, and a decision was entered by a Hearing Examiner on July 10, 1964 (R. 11-25) holding that each of the 18 existing locations[4] met the statutory requirements of discovery, (R. 16) and dismissing the Director's proceedings as to 18 claims. (R. 18) Upon appeal by the Bureau of Land Management, this decision was reversed on August 12, 1955, by the Bureau of Land Management in a decision by its Acting Chief of Office of Appeals and Hearings (R. 25-31) and, upon

[2] 5 U.S.C. Sec's 551-559, Administrative Procedure, and 5 U.S.C. Sec's 701-706, Judicial Review. These provisions were referred to in the Action and Judgment in the District Court as 5 U.S.C. Sec's 1001-1009.

[3] 30 U.S.C. Sec's 612 and 613.

[4] The Bureau of Land Management recognized the validity of two of the claims. The Hearing Examiner held one claim invalid and no appeal was ever taken as to that claim.

appeal by mining claimant, the Secretary of Interior, on June 15, 1966, affirmed the decision of its Bureau of Land Management (R. 32-52). The mining claimant thereupon brought its action for declaratory judgment in the Federal District Court below.

Questions Involved

A. The primary issue throughout the entire proceedings leading to this appeal has been and is whether the findings and established facts, set forth in Hearing Examiner's decision and accepted by the Secretary, constitute the "discovery" required by 30 U.S.C. sec. 23 as defined by the Supreme Court and this Circuit Court of Appeals.

B. The secondary issue has been and is whether or not, in a proceeding by the Department of Interior against mining claims under The Surface Resources Uses Act, evidence offered by the mining claimant that the claims are not valuable for timber, grazing or recreation and that the mining claimant holds and regards the claims in good faith for mining property only is material in the determination of the critical issue of discovery.

Findings and Established Facts

The findings and established facts in this case (R. 11-24) were accepted in total by the Secretary (R. 42). For purposes of brevity, but reserving the benefit of any such facts not hereafter mentioned, the following summary of the findings and established facts is submitted:

(1) there is exposed within the limits of each of the eighteen lode claims in question a vein or lode of rock in

place carrying gold and silver, although none of those surface exposures can be mined at a profit. (R 12)

(2) lying within this group of eighteen lode claims, and forming an integral part thereof, are two other lode claims with exposures (of veins carrying gold and silver) which the Secretary of the Interior himself concedes, in effect, can be mined at a profit. (R.. 24)

(3) the land upon which the eighteen claims in question is located is mineral in character, is within the oldest, most productive and established gold producing mining districts in the United States, and is surrounded by patented lode mining claims. (R. 12, 22)

(4) these claims lie immediately adjacent to the present working area from which the Homestake Mining Company, the largest gold producer in the United States, is extracting ore at a profit. (R. 12)

(5) these mining claims were the subject of two separate and thorough examinations and detailed studies in 1948 and 1961 conducted and supervised by Lawrence B. Wright of San Francisco, a consulting geologist of excellent reputation and qualifications, formerly employed by the Homestake Mining Company for many years, the last six of which as Chief Geologist, and a recognized authority upon and with an intimate knowledge of the geology and gold deposition of the area in which these claims are located. (R. 13-14)

(6) it was the considered professional opinion of geologist Wright, never challenged by the agency's geologists, that:

(a) the ensemble of gold and silver bearing veins exposed at the surface of these eighteen mining claims

were an upward migration or leak of gold and silver values from substantial deposits below. (R.13)

(b) this ensemble is geologically similar to the ensemble showing at the surface of the adjoining workings of the Homestake Mine which have been observed and are known to continue and lead to the depths at which Homestake produces its ore almost exclusively (R. 22-23)

(c) the geology of the Henault ground is structurally related to that of the Homestake Mining Company's ground and ore deposits in such a manner that the possibility of deep ore deposits such as being developed by Homestake may reasonably be expected at mineable depths at Henault. (R. 13)

(d) these veins, carrying gold and silver, exposed at the surface, can be followed and lead to the valuable ore deposits (such as those of the Homestake Mine) that may reasonably be expected at mineable depths below. (R.23)

(7) Based upon those conclusions, geologist Wright recommends a drilling program of at least three holes to a depth of 3,500 to 4,000 feet to probe for the expected deposits below. The estimated drilling cost in 1962 was $14.50 per foot. (R. 13)

The record of the hearing before Examiner Rampton (TR pp. 190 et seq and R. 23-24) shows that Henault offered evidence, made offers of proof, and submitted proposed findings of fact 10, 11, and 12, in support of the following propositions:

the surface of these claims is not valuable for timber.

the surface of these claims is not valuable for grazing.

the surface of these claims is not valuable for building sites.

the surface of these claims is not valuable for recreation.

the mining claimant in good faith regards these claims as a valuable mining property and have substantiated that belief by the expenditure of over $57,000 for assessment work since 1945.

These factors were not denied by the Bureau, but merely objected to as being immaterial. The Hearing Examiner rejected consideration of these factors (T. 190 et seq.), the Bureau's office of Appeals refused to consider them upon the Bureau's appeal, the Secretary held they were immaterial (R. 51) and the District Court, in concluding that there was a valid discovery upon each of the claims, indicated it was thus not necessary to consider the materiality of such factors.

SUMMARY OF ARGUMENT

Introduction: The issue in the original hearing was the sole assertion by the government that "a discovery of valuable mineral" had not been made within the limits of the unpatented lode mining claims in question. The Hearing Examiner, using the judicially approved "prudent man test" and taking into account the economics of the situation, as set forth in the findings and established facts, concluded that a "discovery", as required by 30 U.S.C. sec. 23, had been made within the limits of each of the claims involved. The Secretary, using an interpretation of "discovery" as "understood and used by the Department" reversed the Hearing Examiner. The District Court held that the correct standard for discovery was the prudent man test and concluded that the application of

that prudent man test in the light of all the findings and established facts accepted by the Secretary constituted discovery within the meaning of the statute and directed the Secretary to so find.

The District Court also held that the "Department test" used by the Secretary was based upon erroneous legal theory and not in accordance with law.

A. The "prudent man test" is the proper guide to determine whether the statutory requirement of discovery has been met.

B. The decision of the Secretary invalidates the locations and was based upon an erroneous theory of discovery and defeats purpose of statute.

C. Evidence of good faith and that mining claims are not valuable for timber, grazing, recreation or building sites should be available for use by a mining claimant in support of discovery.

ARGUMENT

Introduction: An unctuous concern over surface resources and an illusory assurance that the Department's decisions do not invalidate these mining claims or prevent further investment of capital have been constantly prescribed by the authors of those decisions as a palliative for their acceptance and such is the tenor of the Introduction in Appellant's Brief. Lest our silence be mistaken for tacit admission, we submit the following observations:

(1) The only theory upon which the Bureau of Land Management could apply the terms of the Surface Resources Uses Act of 1955 to these mining claims, located before the effective date of the Act, was to invalidate those locations,

thereby depriving the mining claimant of the rights a prior location vests in the locator. Therefore, the Bureau instituted its "quiet title" proceeding against these claims upon the theory and contention that the prior locations were invalid for want of the valid discovery necessary to locate a mining claim under 30 U.S.C. sec. 23.

(2) The precise issue created by the Bureau's proceedings in alleging and attempting to establish that the discovery upon which these prior locations are based is just that - is there a discovery within the limits of each of these claims which meets the requirements of the statute for locating them. And, by admission of its own counsel (R. 92) the "discovery" found by the Hearing Examiner in these proceedings is sufficient for the purpose of the patent applications on these claims which are pending the outcome of this appeal.

(3) If the Department is really sincere about their professed motive in seeking only to manage and control the valuable timber and grazing upon these claims, they are once again informed, as they have been repeatedly since 1960, that this mining claimant stands ready to grant them permission to enter upon the surface of these claims for any legitimate purpose contemplated by the Surface Resources Uses Act.

(4) The Department's persistent and continued efforts, to set aside the original decision of its own Hearing Examiner and of Judge Jameson in the District Court below, and at a well nigh lethal cost to the mining claimant, are certainly not explainable by sanctimonious concern over the surface resources it well knows are non existent!

I.

THE "PRUDENT MAN TEST" IS THE PROPER GUIDE TO DETERMINE WHETHER THE STATUTORY REQUIREMENT OF DISCOVERY HAS BEEN MET.

> "Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met."*Castle v. Womble*, 19 L.D. 455, 456 (1894).

This is, and will be referred to hereafter, as the "prudent man test" adopted and approved by the Supreme Court in 1905, *Chrisman v. Miller* 197 U.S. 313, 322, and repeated thereafter in *Cole v. Ralph* 252 U.S. 286, 299; *Cameron v. United States*, 252 U.S. 450, 459; *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335-36; and most recently in *United States v. Coleman;* 390 U.S. 599, 602 (1968); and applied by this Court in *Lang v. Robinson*, 9 Cir., 1906, 148 Fed. 799, 803; *Charlton v. Kelly*, 9 Cir. 1907, 156 Fed. 433, 436; *Cascaden v. Bortolis*, 9 Cir. 1908 162 Fed. 267, 268; *Adams v. United States*, 9 Cir., 1963, 318 F. 2d 861, 870; and most recently in *Converse v. Udall*, (C.A. 9, No. 21, 697, August 19, 1968), not yet reported. In the considered opinions of the original fact finder and of the trial court below, the findings and established facts clearly justify the mining claimant in the further expenditure of from $152,250.00 to $174,000.00 in the deep probing for the paying ore reasonably to be expected at mineable depths below. Even the Department concedes "the claims might be a good gamble for those who can afford to take the chance." (R. 29) That candid observation practically epitomizes the prudent man test.

In his opinion in *U.S. v. Coleman*, supra, at p. 602, Mr. Justice Black pointed out that "the obvious intent (of Congress) was to reward and encourage the discovery of minerals that are valuable in an economic sense." This decision clearly established that the marketability factor ("it must be shown that the mineral can be extracted, removed and marketed at a profit") applies to all locations of mining claims, whether for precious metals, base metals or minerals of widespread occurrence. The findings and established facts before the Hearing Examiner, the Secretary and the District Court below demonstrate, without dispute, that the gold in the paying ore reasonably to be expected at mineable depths below these claims can be extracted, removed and marketed at a profit; the mineral involved is scarce and in dire demand; and the nation's leading gold producer is extracting, removing and marketing this precious metal from a geologically similar structure less than a thousand yards away. These considerations were taken into account by the Hearing Examiner and the District Court. That they were not considered under the title of "marketability test" is not critical - it is sufficient if they were considered under the "economics of the situation. See *Converse v. Udall* (C.A. 9 No. 21 697, at page 10, August 19, 1968,) not yet reported.

The August 1968 decision of this Court in *Converse v. Udall*, supra, at page 5, raises another point of considerable importance - "the finding of some mineral, or even of a vein or lode, is not enough to constitute discovery - their extent and value are also to be considered." It was upon this point that the testimony of witness Wright was so vital in the findings and established facts. Mr. Wright's competent and professional opinion was that the ensemble of veins and structure on the Henault claim was geologically similar to those which existed over at Homestake and which were followed to the depth where Homestake mines and produces its ore. He concluded

that the ensemble of veins on Henault could be similarly followed to mineable depths with a reasonable expectation of the same results that made Homestake the biggest gold producer in the nation. Further than that, Wright's testimony (specifically noted by Judge Jameson below) was that

> "The fact that the values are low at the surface does not or cannot be ruled out as not being important in a situation such as we have here at Henault where there is other evidences of mineralization like hydrothermal alteration, zones that are mineralized with some quartz, pyrite and, maybe, $2 or $3, $5 a ton in gold in some instances. You don't find this kind of thing in many areas, even in the Black Hills. You find no hydrothermal alterations. You find none of these features at all." p. 67 Wright Deposition.

It is to be noted that the situation established in this case is diametrically opposite to that involved in the East Tintic ruling that occupies so much of Appellant's Brief. In East Tintic, the Secretary based his ruling upon the fact that there had not been shown any connection between the surface exposures and deposits "supposed to exist below". It was this decision and language in East Tintic that necessitated and justified the expense of taking Wright's deposition in San Francisco in the preparation for the original hearing before the Hearing Examiner.

Concluding upon this section of our Argument, it is submitted that the proper guide to be used in the determination of the "discovery" involved in this case is the "prudent man test" as defined in the recent decision of the Supreme Court in *U.S. v. Coleman*, supra, and followed by this Court in *Converse v. Udall*, supra, and that under this test thus defined and refined, the accepted findings and established facts before the Bureau of Land Management and Department of the Interior, met the requirements of the statute.

II.

THE DECISION OF THE SECRETARY INVALIDATES THE LOCATIONS AND WAS BASED UPON AN ERRONEOUS THEORY OF DISCOVERY AND DEFEATS PURPOSE OF STATUTE.

A. Invalidation of Location

The eighteen mining claims in question were located prior to 1955. The issue involved throughout the proceedings, from inception to the present appeal, has been whether the findings and established facts offered in support of those prior locations constituted a discovery thereby excluding these claims from the effect of the Surface Resources Uses Act of 1955.

The Secretary's decision was that those accepted facts and circumstances do not constitute the "discovery" required by the statute, 30 U.S.C. sec. 23. The import of the Secretary's decision is clearly demonstrated within the very statute itself:

> "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

Without "discovery" there can be no location, and without a prior valid location these claims are subject to the Surface Resources Act of 1955. Appellants assurance that their determination of non-discovery does not invalidate the claims loses its allure in the face of the level observation of the Supreme Court in *Cameron v. United States* (1920) 252 U.S. 450, at page 456:

> "To make the claim valid, or to invest the locator with a right of possession, it was essential that the land be mineral in character and that there be an adequate mineral discovery within the limits of the claim as located (Rev. Stats. Sec. 2320***)."

B. Based on Erroneous Theory of Discovery

The Secretary's decision is based upon the theory that the statutory "discovery" requires the mining claimant to actually and physically expose mineral bearing rock in place, possessing in and of itself a present or prospective value for mining purposes.

Appellant cites rulings of the Department in support of this contention. However, there is a significant absence of judicial authority for such a requirement.

As was pointed out by the Hearing Examiner, a determination that the findings and established facts do not constitute a sufficient discovery is tantamount to holding no discovery exists until paying ore is exposed. Yet this is precisely the effect of the subsequent Departmental rulings. The District Court agreed, with the Hearing Examiner, that such rulings were not in accordance with law. Appellant still insists that the exposure must "possess in and of itself a present or prospective value for mining purposes." Such a requirement not only goes far beyond the proper guide as established by the Supreme Court, but has no judicial support whatsoever. It was recently pointed out that the locator is not required to prove he will in fact develop a profitable mine. *Converse v. Udall* (C.A. 9, No. 21,697, at page 10, August 19, 1968). The Appellant's Brief transcends even the contention that the locator must show he will develop a profitable mine - they require the locator to establish that he already has a profitable exposure.

C. Defeats Purpose of Statute

The intent of the mining law is well and often recognized and given considerable weight in the judicial interpretation thereof. The most recent acknowledgement was given in *U.S. v. Coleman*, supra, at page 602:

"The obvious intent was to reward and encourage the

discovery of minerals that are valuable in an economic sense."

That such intent is not unknown to those for whom the Appellant's Brief is written is evident from a published except from a ruling by a former Director of the Bureau of Land Management:

"It is my belief that the major intent of the mining law is to encourage the development of minerals not to hinder that development. In an area where pay ore is ordinarily found only at great depths, it is obvious that even the most enterprising miner must have more than ordinary faith and courage since he must stake his time and money on following evidences of possible mineral which to many would seem no more than mere will o' the wisp. Unless the enterprise of such as these is recognized many valuable deposits are doomed to remain dormant in the depths of the earth of no value to anyone. This is not consistent with the great present day need for the development of minerals in the interest of the National defense and the public welfare. Nor is it, I am persuaded, consistent with the intent of the law." *U.S. v. Arnold, Department of the Interior. Decision Bureau of Land Management* (1954), Contest No. 978, M.S. No. 3373 Mineral, Coeur d' Alene 013984, M: R.L.W.

So too should the rationale of the "prudent man test" be considered in the selection of the proper test of discovery. This was graphically described in the creation of the test:

"For; if as soon as minerals are shown to exist and at any time during exploration, before the returns become remunerative, the lands are to be subject to other disposition, few would be willing to risk time and capital in the attempt to bring to light and make available the mineral wealth, which lies concealed in the bowels of the

earth, as Congress must obviously intended the explorers should have proper opportunity to do." *Castle v. Womble* (1894) 19 L.D. 455, 457.

The decision for the Secretary requires, as a prelude to a possible concession of valid discovery, this mining claimant to embark upon the recommended program of probing for the valuable ore deposits reasonably to be expected at mineable depths below. It is conceded that this would involve an expenditure of capital estimated from $152,250.00 to $174,000.00. Can it be seriously believed that anyone is going to embark upon capital outlay of that magnitude without the assurance that its locations are supported by the "discovery" which guarantee him that during and after such an undertaking the land will not be subject to other disposition. That requirement is not only legally unsupportable, but would also constitute a departmental fiat, inadvertent as it must surely be, that couldn't be better designed to smother forever the priceless initiative of private industry in the search for and development of the metals upon which our continued existence so vitally depends.

III.

EVIDENCE OF GOOD FAITH AND THAT MINING CLAIMS ARE NOT VALUABLE FOR TIMBER, GRAZING, RECREATION OR BUILDING SITES SHOULD BE AVAILABLE FOR USE BY A MINING CLAIMANT IN SUPPORT OF DISCOVERY.

The Bureau never deigned to attempt a proper showing that there existed in fact upon these claims the commercial timber and grazing resources which is the subject of the Surface Resources Uses Act upon which they based their proceedings. And to one having first hand knowledge of the claims such restraint is readily understandable. The Bureau's efforts in this connection were concerned with preventing the mining